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DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**

WASHINGTON, D.C. 20548



FILE:

B-182231

DATE: JUL 10 1975

MATTER OF:

Shirley N. Bingham - Overtime compensation

DIGEST:

1. Employee alleged that she was compelled to perform substantial amounts of overtime because her superiors assigned her an abnormal workload. Her claim is denied, since she failed to show the work was ordered or induced by an official who had authority to order or approve overtime and failed or refused to do so.
2. Although Fair Labor Standards Act of 1938 has been amended to apply to Federal employees, professional employees are exempted from application of the overtime provisions of the Act. 29 U.S.C. 213(a)(1) (1970).

This decision is in response to a request for a reconsideration of the disallowance by our Transportation and Claims Division (TCD) of a claim submitted by Shirley N. Bingham, an employee of the National Labor Relations Board (NLRB), for overtime compensation.

Ms. Bingham states that since July 1, 1970, she served as a Compliance Officer, an attorney position, in District 20 of the National Labor Relations Board. She contends that, although she was not explicitly ordered to work overtime either orally or in writing, she had no alternative but to do so in order to retain her position in good standing. She states that position cutbacks, a heavy case load, lack of instruction in duties, and lack of orderly office procedures were factors underlying the circumstances which compelled her to perform overtime work. She further states that she was prohibited from referring her problems which caused her to work overtime to the Regional Director by the Regional Attorney. TCD, in Settlement Certificate Z-2137042, July 15, 1974, disallowed the claim because the overtime work was neither authorized or approved as required by 5 U.S.C. 5542 (1970).

Ms. Bingham has implied that recent amendments to the Fair Labor Standards Act of 1938, 29 U.S.C. 201-219 (1970), by the Fair Labor

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Standards Amendments of 1974, Pub. L. 93-259, 88 Stat. 55, would make the Act applicable to her. Ms. Bingham errs in this contention, however, since persons employed in a professional capacity are exempted from the overtime provisions of the Fair Labor Standards Act. 29 U.S.C. 213(a)(1) (1970).

The main thrust of Ms. Bingham's request for reconsideration of her claim is that she was compelled by her supervisors to perform the overtime in order not to fall behind in the performance of her work. Therefore, we have considered whether her case falls within the ambit of the ruling of the Court of Claims in Baylor v. United States, 198 Ct. Cl. 331 (1972). That case summarizes the principles for establishing whether an employee may be paid overtime on the basis that overtime was ordered or induced by the employee's supervisors.

In Baylor the court stated in 198 Ct. Cl. at 359 the following:

" * * * This case is important in that it illustrates the two extremes; that is, if there is a regulation specifically requiring overtime promulgated by a responsible official, then this constitutes 'officially ordered or approved' but, at the other extreme, if there is only a 'tacit expectation' that overtime is to be performed, this does not constitute official order or approval.

"In between 'tacit expectation' and a specific regulation requiring a certain number of minutes of overtime there exists a broad range of factual possibilities, which is best characterized as 'more than a tacit expectation.' Where the facts show that there is more than only a 'tacit expectation' that overtime be performed, such overtime has been found to be compensable as having been 'officially ordered or approved,' even in the absence of a regulation specifically requiring a certain number of minutes of overtime. Where employees have been 'induced' by their superiors to perform overtime in order to effectively complete their assignments and due to the nature of their employment, this overtime has been held to have been 'officially ordered or approved' and therefore compensable. Anderson v. United States, 136 Ct. Cl. 365 (1956) * * * (Customs Border Patrol Inspectors); Adams v. United States, 162 Ct. Cl. 766 (1963) (Inspectors of

the Border Patrol of the Immigration and Naturalization Service); Byrnes v. United States, 163 Ct. Cl. 167, 324 F. 2d 966 (1963), as amended, 330 F. 2d 986 (1964) (Investigators of the Internal Revenue Service Alcohol and Tobacco Tax Division). In Rapp v. United States * * */340 F. 2d 635 (Ct. Cl. 1964)/ the court held that the performance of overtime by employees of the Civil Defense Administration was not voluntary but was 'induced' by the employees' reasonable and understandable fear that they would jeopardize their positions if they did not perform the additional after-hours duty. The court concluded that the 'induced' duty officer tours were 'officially ordered' and 'approved' within the meaning of the Federal Employees Pay Act of 1945, * * */now codified at 5 U.S.C. 5542 (1970)/"

The court in Baylor, at 360, also stated that:

"As a prerequisite in this type of case, plaintiff has the burden of proving that the order or approval to perform overtime was issued by an official who had the authority to do so. Bowling v. United States, 181 Ct. Cl. 968 (1967); Billello v. United States, 174 Ct. Cl. 1253 (1966); Albright * * */v. United States, 161 Ct. Cl. 356 (1963)/. * * *"

The court in Billello, supra, stated at 1257, the following:

"The common denominator derived from these results is that a regulation requiring approval of overtime by a designated official before it can be paid is binding on claimants unless the regulation is unreasonable or the official who has withheld formal written approval has nevertheless actively induced and encouraged the overtime. Mere knowledge on his part, without affirmative inducement or written sanction, would not seem to be sufficient. * * *"

In order to determine whether Ms. Bingham is entitled to overtime compensation, it is necessary to determine whether she was ordered or induced to perform the work in question by an official who had authority to order or approve overtime work. The record indicates that such authority was vested in the Regional Director and that he was required to obtain approval of the central office when the workload of a staff member required extended periods of overtime.

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The claimant has stated that she obtained her appointment on July 1, 1970, and subsequent to that date appealed to the Regional Attorney, a Mr. Harvey Letter, for assistance, stating that the overtime work necessitated by her job was injurious to her health. She further stated that Mr. Letter would not provide such assistance and explicitly ordered her not to discuss her need for assistance with the Regional Director. She further stated that Mr. Letter left the NLRB in 1972. It is clear from Ms. Bingham's own statements that there was no reason that she could not have discussed her need for assistance with the Regional Director subsequent to Mr. Letter's departure. For the period prior to Mr. Letter's departure, his injunction not to discuss the matter with the Regional Director should have been appealed. As the court in Dilello stated, at 174 Ct. Cl. 1258, in a similar situation--

" * * * Administrative efficiency requires observance of orderly forms, and by voicing their demands through proper channels the plaintiffs conceivably could have secured a ruling which would have resulted either in an order for overtime compensation or in a justified refusal on the part of the plaintiffs to continue performing overtime work without compensation."

There is no indication in the record that Ms. Bingham claimed any overtime prior to May 7, 1974, when she sent a memorandum to the Deputy General Counsel of the NLRB. In that communication she made known her problems and requested overtime compensation. That request was denied by a memorandum dated June 14, 1974, on the basis that the overtime had not been officially ordered or approved. Subsequently, on August 29, 1974, she requested the Regional Director to approve the overtime in question. On December 20, 1974, the Regional Director denied her overtime compensation and admonished her for not discussing her problems with him earlier.

In view of the above, we cannot state that Ms. Bingham has met the prerequisite, as set forth in Baylor, supra, of proving that she was ordered or induced to perform overtime by an official who had authority to do so. In fact, the record indicates that the official who did have authority to order or approve overtime, the Regional Director, had no knowledge of the problem, and therefore could not have induced the overtime.

Accordingly, the disallowance of the claim for overtime compensation by Ms. Bingham is sustained.

Paul T. G. Dembling

For the Comptroller General
of the United States